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[REDACTED]

**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
[REDACTED]

DECISION

CCO/147616

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**PRELIMINARY RECITALS**

Pursuant to a petition filed February 25, 2013, under Wis. Admin. Code § HA 3.03, to review a decision by the Kenosha County Human Service Department in regard to Child Care, a hearing was held on May 21, 2013, at Kenosha, Wisconsin. The record was held open for written briefs, an opportunity to respond to a Final Decision in an another case (#145343) similar to the instant case and to see if an additional fact could be ascertained and agreed to by the parties; specifically, when the employer involved obtained his FEIN. It is not possible to obtain that information as the employer fired Petitioner, apparently as a result of this case and is not cooperative.

The issue for determination is whether the county agency correctly determined that the Petitioner was overpaid \$5904.20 in child care benefits during the November 1, 2011 through November 30, 2012.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]

Petitioner's Representative:

Attorney Patricia DeLessio  
230 West Wells Street, Room 800  
Milwaukee, WI 53203

Respondent:

Department of Children and Families  
201 East Washington Avenue  
Madison, Wisconsin 53703

By: Karen Mayer

Kenosha County Human Service Department  
8600 Sheridan Road  
Kenosha, WI 53143

Represented By:

Atty. Nancy C. Wettersten  
Department of Children & Families (DCF) – Office of Legal Counsel

**ADMINISTRATIVE LAW JUDGE:**

David D. Fleming  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Kenosha County.
2. Petitioner was sent a notice of child care overpayment dated February 6, 2013 that informed Petitioner that she had been overissued child care benefits in the amount of \$5718.84 during the time

period from November 1, 2011 through October 31, 2012. Petitioner was sent a second notice on February 6, 2013 that informed her that she had been overissued child care benefits in the amount of \$185.36 during the time period of November 1, 2012 to November 30, 2012. Both overissuances were noted to be a result of agency error. Thus the total overpayment alleged here is \$5904.20.

3. The reason for this alleged overissuance was that Petitioner was not working for a qualified employer as that term is used by the Wisconsin Shares Child Care Program (Shares). Petitioner was working as a waitress at Home Run Family Restaurant; she worked here for 13 years. Upon investigation prompted by a Department of Children and Families (Department) reminder to the county agency to adhere to child care policies, the local agency realized that the employer did not have or was not reporting a Federal Employer Identification Number (FEIN).
4. Though Petitioner did not have a Social Security number and was not filing income taxes returns she was filing six month report forms or otherwise reporting income to the county agency as required. She and/or the employer did report wages on these SMRFs though the amount of Petitioner's earnings reported was inconsistent. The employer never reported a FEIN on its submissions.
5. The employer did produce a FEIN in January 2013 after the overpayment investigation was initiated.
6. It is not disputed that Petitioner was approved for and using child care services during the time involved here. The child care program paid \$5,904.20 in benefits to the daycare provider for this child's daycare services during this period.

### DISCUSSION

The applicable overpayment rule requires recovery of the overpayment, regardless of whether it was the fault of the client or the agency. *Wis. Admin. Code §DCF 201.04(5)(a)*; see also *Wis. Stat. §49.195(3)*. Thus, even if the overpayment was caused by agency error, the agency may still establish an overpayment claim against Petitioner. There was no contention that the county agency ever advised Petitioner that her approved activity status was in jeopardy because the employer was not a "qualified employer" until after the overpayment. In fact, the testimony indicates that the agency was simply not enforcing the Department's policy. Thus the agency agreed that it was its own error in ever authorizing the child care without the FEIN.

In this case, the Petitioner does not contest that she took her child(ren) to day care during the identified period, and she does not quarrel with the agency's arithmetic in the overpayment calculation. Petitioner's argument is that the agency is acting contrary to state law, administrative code and policy.

The child care subsidy program's authorizing statute contains financial and nonfinancial eligibility criteria. If applicant parents do not meet the eligibility criteria, then child care cannot, or should not, be granted. The agency asserts that the lack of qualified employment/approved activity made Petitioner ineligible for the child care benefits. The pertinent portion of the statute setting out nonfinancial eligibility criteria reads as follows:

**(1m) ELIGIBILITY.** A Wisconsin works agency shall determine eligibility for a child care subsidy under this section. Under this section, an individual may receive a subsidy for child care for a child who has not attained the age of 13 ...if the individual meets all of the following conditions:

(a) The individual is a parent of a child who is under the age of 13 ...and *child care services for that child are needed in order for the individual to do any of the following:*

...

2. **Work in an unsubsidized job**, including training provided by an employer during the regular hours of employment.

...

*Wis. Stat. §49.155(1m)(a)(emphasis added). Also see, Wis. Admin. Code §DCF 201.04(2g)(d).*

Neither the Statutes, nor Wisconsin Administrative Code Chapter 201 define either “unsubsidized job” or “employer.” Another code chapter with some limited provisions regarding child care contains the following definition of “unsubsidized employment:”

**DCF 101.03 Definitions.** Unless otherwise provided, in this chapter:

...

**(35)** "Unsubsidized employment" means employment for which the Wisconsin works agency provides no wage subsidy to the employer including self-employment and entrepreneurial activities.

*Wis. Admin. Code §DCF 101.03(35); also see Wis. Stat. §49.197(1).*

Here it is the program’s *Wisconsin Shares Child Care Assistance Manual (Manual)* that provides the requirements that the agency was relying on when it determined that Petitioner’s unsubsidized employment did not constitute an approved activity for child care purposes. *The Manual* is available online at <http://dcf.wisconsin.gov/childcare/wishares/manual.htm>. This is the heart of the issue here. The *Manual* states that only two types of unsubsidized employment can create nonfinancial eligibility: (1) self-employment or (2) “working for a qualified employer who has a Federal Employer Identification Number (FEIN).” *Manual*, §1.5.3. The *Manual* then goes on to further define “qualified employers” and the requirement of the FEIN:

#### **1.5.3.1 Qualified Employers**

All qualified employers must have a FEIN documented in the individual’s CARES Worker Web record for the verification of the unsubsidized employment to be considered complete.

If the FEIN is already on file on the Employment Page or the worker knows the FEIN for the employer, the employer does not have to re-verify the number unless the worker believes that the FEIN is incorrect.

Incorrect FEINs are considered incomplete verification (See Section 1.3.4 Missing Verification for incomplete verification steps for new applicants, Program Adds, SMRFs and Reviews.

Children of parents who are employed by certified child care providers are not eligible for an authorization at the child care provider where their parent is employed.

If the employer is a child care provider or a business owned or managed by the provider, or if the reported employment appears to be questionable, the following employer items must be verified. Please refer to the Appendix for suggested verification steps.

- The employer must have a Worker’s Compensation insurance policy for its employees unless legally exempt.
- The employer must comply with Wisconsin minimum wage law for all employees.
- The employer must file a New Hire report on the employee within thirty days of the hiring date.
- The employer must report wages to Unemployment Insurance unless exempt.

*Manual*, §1.5.3.1.

The parties do not disagree about the facts of this case. There is agreement that Petitioner was working and that it was unsubsidized employment. Further, it is apparent that the local agency was not enforcing the policy that is at the core of this case at the time of the overpayment. Indeed, the child care eligibility appears to have started for Petitioner at the agency’s suggestion during a case review for other benefits.

Petitioner notes that the Wis. Admin Code states that a child care overpayment is a benefit issued in an amount greater than a person was eligible for under state law and rules. She notes that state law simply requires unsubsidized employment (the approved activity relevant here). §49.155(1m)(a), *Stats.* Petitioner contends that the requirement that an employer have a FEIN is imposed by the *Manual* and nowhere in the Statutes or Administrative Code and is, therefore, an unpromulgated rule. Petitioner also

argues that it is illogical to penalize a parent for a failure of an employer. She notes that the employer did, in fact, have a FEIN and provided that when it was asked to do so in January 2013 and that no proof was presented at the hearing that the employer did not report Petitioner's hire or wages to any government unit or that there was no unemployment or worker's compensation in place. Alternatively she argues that if these things were not done that there is no ability for the employer to do so where the parent has no Social Security number and that nothing in the regulatory scheme requires that a parent have a Social Security number in order to be eligible to receive child care benefits. Thus Petitioner contends that she was not over issued child care benefits.

The Department contends that the *Manual* definition of 'qualified employer' controls here and harmonizes child care law with general law requiring reporting new hires, reporting wages and having unemployment compensation and worker compensation in place. To do that requires a FEIN. The Department contends that the child care law and these provisions of law relevant to employers must be read together and lead to the conclusion that the employer in this case was not a 'qualified employer'.

In a very similar Division of Hearings and Appeals case involving this same issue and same county the Division of Hearings and Appeals issued a Proposed Decision that concluded that the qualified employer provision of the *Manual* was subject to an exception under facts virtually identical to this case. *Division of Hearings and Appeals case # CCO-145434, issued June 6, 2013.*

The Final Decision, however, reversed the original Proposed Decision with the following language added to that original Proposed Decision:

Using the FEIN as a tool to ensure that the employer is legitimate is a reasonable fleshing out of statutory and code requirements. The Child Care Manual definition for 'qualified employers' and 'legitimate self-employment' reflect current Wisconsin Wage and Unemployment insurance laws. Additionally, IRS rules require all employers are required to report employment taxes or give tax statements to employees to have the Federal Employer Identification Number (FEIN). Verifying that the employer has a FEIN indicates that the employer is legitimate and helps ensure programs integrity. The requirement to recover an overpayment, even where the error was on the part of the agency, may seem harsh. However, the rule is designed to prevent collusion on the part of workers and applicants. The agency is required to establish the overpayment and take all reasonable steps to recover the amount.  
*Division of Hearings and Appeals case #145434, Final Decision issued August 22, 2013.*

In a brief written argument submitted post Final Decision for case # 145434, Petitioner contends that State law does not require a SSN to receive child care and that without a SSN the employer could not report wages, etc., and that the Final Decision just noted does not resolve inconsistencies between this qualified employer policy and the rest of the relevant State law and urges that it be resolved here.

Nonetheless, in the end here, this case is controlled by the Final Decision in case #145343. The Division of Hearings and Appeals is required to assign one of its staff to conduct hearings for the DCF per §227.43, *Stats.* if the DCF is required to conduct a hearing and chooses not to do so itself. As the Division of Hearings and Appeals decides cases on behalf of the Department in these hearings, prior Department policy decisions do form a basis for judgment and there has been a historical understanding that the Division of Hearings and Appeals will not stray from past Final Decisions absent changes in law or policy.

### **CONCLUSIONS OF LAW**

That Petitioner was working in unsubsidized employment during the alleged overpayment period but was not working for a qualified employer as that term is defined by the Wisconsin Shares Child Care Program, thus Petitioner was overissued child care benefits as alleged.

**THEREFORE, it is**

**ORDERED**

That this appeal is dismissed.

**REQUEST FOR A REHEARING**

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

**APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

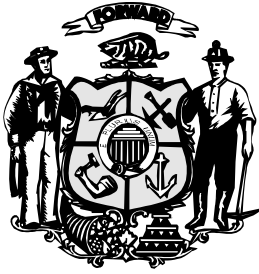
For purposes of appeal to circuit court, the Respondent in this matter is the Department of Children and Families. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 201 East Washington Avenue, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 18th day of November, 2013

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\sDavid D. Fleming  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on November 18, 2013.

Kenosha County Human Service Department  
Public Assistance Collection Unit  
Child Care Fraud